BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

UPC HAWAII HOLDINGS, LLC, and KAHEAWA WIND POWER II, LLC Complainants, vs. MAUI ELECTRIC COMPANY, LIMITED, and HAWAIIAN ELECTRIC COMPANY, INC., Respondents.	)	DOCKET NO. 2008-0021

ORDER NO. 24034

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DIV. OF CONSUMER ADVOCACY

Filed February 11, 2008

At 2 o'clock P .M.

for Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
for Chief Clerk, Public Utilities
Commission, State of Hawaii.

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

UPC HAWAII HOLDINGS, LLC, and KAHEAWA WIND POWER II, LLC Complainants, vs. MAUI ELECTRIC COMPANY, LIMITED, and HAWAIIAN ELECTRIC COMPANY, INC., Respondents.	Docket No. 2008-0021 Order No. 24034

ORDER

By this Order, the commission orders MAUI ELECTRIC COMPANY, LIMITED ("MECO") and HAWAIIAN ELECTRIC COMPANY, INC. ("HECO") (jointly, "Respondents") to file an answer to the formal complaint filed by UPC HAWAII HOLDINGS, LLC ("UPC Hawaii") and KAHEAWA WIND POWER II, LLC ("Kaheawa Wind") (jointly, "Complainants"),[1] attached as Exhibit A,[2] within twenty (20) days after the date of service of this Order.

The commission also instructs the Parties to file a stipulated procedural schedule for the commission's review and approval, within thirty (30) days from the date of this Order, which (absent a waiver by the Parties) allows the commission to issue a decision and order in this docket within 120 days of the

[1]Respondents and Complainants will collectively be referred to herein as the "Parties."

[2]Verified Complaint and Petition of UPC Hawaii Holdings, LLC, and Kaheawa Wind Power II, LLC, filed on February 6, 2008 ("Complaint").

filing of the Complaint, pursuant to Hawaii Administrative Rules ("HAR") § 6-74-15(f). Alternatively, in the absence of a formal procedural schedule, each party shall submit a proposed procedural schedule for the commission's consideration by the same date.

I.

Complaint

On February 6, 2008, Complainants filed their Complaint with the commission against Respondents, alleging, in sum, that:

> MECO and HECO have jointly or in combination acted (1) in violation of the Commission's rules implementing the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA") and against public policy encouraging the development of Hawaii's and the Nation's renewable energy resources and to the detriment of the ratepayers and electric energy consumers on the Island of Maui by refusing to execute an agreement for the purchase of energy from UPC Hawaii's proposed second power project on the Island of Maui currently being developed by Kaheawa Wind, (2) in violation of HAR Section 6-74-15(c) by failing to petition this Commission for a hearing although substantially more than 75 days has elapsed since Kaheawa Wind tendered an offer to sell electric energy from its Project to MECO and the parties have not reached agreement on the terms of such sale and purchase, and (3) in violation of PURPA, the Commission's rules and Hawaii law by devising and unilaterally imposing a "mini-competitive bidding" process on UPC Hawaii and concluding that HECO and MECO would no longer negotiate with UPC Hawaii or Kaheawa Wind for a power purchase agreement for the Project.[3]

Complainants filed the Complaint as a formal complaint under HAR § 6-61-67. The Complaint appears to substantially

[3]Complaint at 1-2.

comply with HAR Title 6, Chapter 61, Subchapter 5 of the commission's Rules of Practice and Procedure. Therefore, pursuant to HAR § 6-61-67(e), Respondents must file an answer to the Complaint within twenty (20) days after the date of service of this Order.

Complainants also allege that Respondents violated HAR § 6-74-15(c). Pursuant to HAR § 6-74-15(f), the commission is required to decide a petition filed under HAR § 6-74-15(c) "within 120 days of the filing of the petition; provided that the commission, for good cause, may modify the time limit." Accordingly, the commission directs the Parties to file a stipulated procedural schedule for the commission's review and approval, within thirty (30) days from the date of this Order, which (absent a waiver by the Parties) allows the commission to issue a decision and order in this docket within 120 days of the filing of the Complaint. Alternatively, in the absence of a formal procedural schedule, each party shall submit a proposed procedural schedule for the commission's consideration by the same date.

II.

Orders

THE COMMISSION ORDERS:

1. Respondents shall file an answer to the attached Complaint with the commission within twenty (20) days after the date of service of this Order.

2. The Parties shall file a stipulated procedural schedule for the commission's review and approval, within thirty (30) days from the date of this Order, which (absent a waiver by the Parties) allows the commission to issue a decision and order in this docket within 120 days of the filing of the Complaint.

3. Alternatively, in the absence of a formal procedural schedule, each party shall submit a proposed procedural schedule for the commission's consideration by the same date.

DONE at Honolulu, Hawaii FEB 11 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By: John E. Cole
John E. Cole, Commissioner

By:
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Kaiulani Kidani Shinsato
Kaiulani Kidani Shinsato
Commission Counsel

2008-0021.cp

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

UPC HAWAII HOLDINGS, LLC, and KAHEAWA WIND POWER II, LLC Complainants, vs. MAUI ELECTRIC COMPANY, LIMITED, and HAWAIIAN ELECTRIC COMPANY, INC., Respondents.	DOCKET NO. 2008-0021 FILED FEB 06 2008 Public Utilities Commission

**VERIFIED COMPLAINT AND PETITION
OF UPC HAWAII HOLDINGS, LLC, AND
KAHEAWA WIND POWER II, LLC**

AND

CERTIFICATE OF SERVICE

Of Counsel:

CARLSMITH BALL LLP

GERALD A. SUMIDA
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EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

UPC HAWAII HOLDINGS, LLC, and KAHEAWA WIND POWER II, LLC Complainants, vs. MAUI ELECTRIC COMPANY, LIMITED, and HAWAIIAN ELECTRIC COMPANY, INC., Respondents.	DOCKET NO. 2008-0021

VERIFIED COMPLAINT AND PETITION
OF UPC HAWAII HOLDINGS, LLC, AND
KAHEAWA WIND POWER II, LLC

I. INTRODUCTION

UPC Hawaii Holdings, LLC, a Delaware limited liability company ("UPC Hawaii"), and Kaheawa Wind Power II, LLC, a Delaware limited liability company and a wholly-owned subsidiary of UPC Hawaii ("Kaheawa Wind") (references to "UPC Hawaii" shall be deemed to include Kaheawa Wind, unless the context otherwise indicates; and UPC Hawaii and Kaheawa Wind are sometimes hereinafter collectively referred to as the "Complainants"), pursuant to Section 6-61-67, Hawaii Administrative Rules ("HAR"), through their undersigned counsel, file this Verified Complaint and Petition against Maui Electric Company, Limited ("MECO") and Hawaiian Electric Company, Inc. ("HECO"). Complainants allege that MECO and HECO have jointly or in combination acted (1) in violation of the Commission's rules implementing the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA") and against public policy encouraging the development of Hawaii's and the Nation's renewable energy resources and to the detriment of the ratepayers and electric energy consumers on the

Island of Maui by refusing to execute an agreement for the purchase of energy from UPC Hawaii's proposed second power project on the Island of Maui currently being developed by Kaheawa Wind, (2) in violation of HAR Section 6-74-15(c) by failing to petition this Commission for a hearing although substantially more than 75 days has elapsed since Kaheawa Wind tendered an offer to sell electric energy from its Project to MECO and the parties have not reached agreement on the terms of such sale and purchase, and (3) in violation of PURPA, the Commission's rules and Hawaii law by devising and unilaterally imposing a "mini-competitive bidding" process on UPC Hawaii and concluding that HECO and MECO would no longer negotiate with UPC Hawaii or Kaheawa Wind for a power purchase agreement for the Project.

As discussed more fully below, UPC Hawaii, through Kaheawa Wind, is undertaking the development, construction, ownership and operation of a 21 megawatt ("MW") wind energy project, equipped with a customized and innovative Battery Energy Storage System, at Kaheawa Pastures on Maui (the "Project"), which is adjacent to UPC Hawaii's existing 30 MW wind energy project that has been selling to MECO all of its output since June 2006. Since June 2006 UPC Hawaii has in good faith been negotiating a power purchase agreement with MECO to sell to MECO needed electric energy to be generated from Maui's renewable wind resources by the Project at a purchase rate at or below MECO's avoided costs. The Project is a qualifying facility ("QF") under PURPA and the Commission's Standards for Small Power Production and Cogeneration in the State of Hawaii, HAR Title 6, Chapter 74 (the "Commission's Standards"), and is also a non-fossil fuel producer under Haw. Rev. Stat. ("HRS") 269-27.2

During the course of almost two years of negotiations, UPC Hawaii has, in response to MECO's and HECO's successive rounds of questions and information requests, submitted successive responses, clarifications and variations of its original proposal, including (i) reducing the capacity of the Project from an initially proposed 27 MW to 21 MW, (ii) voluntarily offering a total self-curtailment of the Project's electric energy output during MECO's off-peak periods, and (iii) developing and integrating a customized and innovative Battery Energy Storage System as an integral part of the Project, all in order to address and accommodate MECO's vaguely stated concerns over, among other things, the integration of as-available wind energy into MECO's grid system.

MECO and HECO (which has conducted these power purchase agreement negotiations on behalf of MECO) have continuously assured UPC Hawaii of their joint intention to negotiate in good faith with UPC Hawaii for a power purchase agreement. On June 12, 2006, UPC Hawaii submitted its proposal to HECO for the Project, and expected that HECO and MECO would meet with UPC Hawaii to commence negotiations and would undertake an interconnection requirements study (the "IRS") required by HECO and MECO to be able to complete the design of the Project and the interconnection facilities and to identify any particular interconnection issues involved. Instead, HECO raised a continuing series of questions about the Project and expressed vague and undefined concerns about integration of as-available wind energy into MECO's grid system, but refused to respond to UPC Hawaii's request that HECO undertake the IRS to identify these issues. This prompted UPC Hawaii to arrange for an independent integration study using data provided by HECO and MECO, although they never substantively responded to the study results and recommendations.

Then on June 6, 2007, HECO informed UPC Hawaii that MECO was undertaking its own integration study, which should be completed sometime in 2008. Thereafter HECO and MECO proceeded in what they described as a "structured negotiation format" to decide whether and with whom to continue negotiations for a power purchase agreement with one of the two developers that were "grandfathered" under the Commission's Framework for Competitive Bidding (the "Framework")[1]. HECO subsequently asked UPC Hawaii to submit an updated proposal not later than August 31, 2007, and UPC submitted an updated and enhanced proposal that included (i) reducing the Project capacity from 27 MW to 21 MW, (ii) offering voluntarily to curtail fully the Project's electric energy output during MECO's off-peak periods, and (iii) incorporated a customized and innovative Battery Energy Storage System, all to address MECO's wind integration concerns. Thereafter, HECO raised still further questions about the updated and enhanced proposal and asked UPC Hawaii to respond by October 24, 2007, which UPC Hawaii did. HECO then followed with two more information requests, to which UPC Hawaii also promptly responded. There was no further response from HECO. In view of that lack of communication, UPC Hawaii requested a meeting with HECO. This meeting was held on December 13, 2007, at which UPC Hawaii provided an updated report on the Project and how the reduction in the Project's capacity, the voluntary self-curtailment and the Battery Energy Storage System would resolve HECO's and MECO's wind integration concerns. Eight days later, UPC Hawaii received HECO's letter, dated December 21, 2007, stating that HECO had decided to enter into negotiations for a power purchase agreement with Shell Wind because "For similar sized wind projects employing battery storage technology, it was decided that reduced wind resource coincidence offered by the Shell wind site was an important advantage."

Throughout the period from the date that UPC Hawaii first made its proposal for the Project to HECO and MECO on or about June 12, 2006, submitted its updated and enhanced proposal to them at their request on August 31, 2007, and submitted a further responses to

[1] The Commission adopted the Framework in its Decision and Order No. 23121, filed December 8, 2006, in the Commission's Docket No. 03-0372.

HECO's questions to them at their request on October 24, 2007, and continuing through December 21, 2007, UPC Hawaii has done everything in its power to cause HECO to undertake the IRS and to complete the negotiation of a power purchase agreement with MECO and HECO. HECO's and MECO's individual and collective responses have been (1) to continue successively requesting so-called clarifications and additional information about the Project, (2) to continue to raise unspecified and only general "concerns" regarding the integration of the Project into MECO's grid system, without undertaking the IRS that UPC Hawaii repeatedly requested and without addressing the specific analyses and the voluntary self-curtailment and the Battery Energy Storage System proposals that UPC Hawaii had developed and proposed to HECO and MECO to deal with those unspecified HECO and MECO concerns, (3) to impose unilaterally their own informal type of "mini-competitive bidding" process developed by HECO and MECO to pit UPC Hawaii's Project against Shell Wind's project without stating the system requirements and specifications of the MECO system, the procedural and substantive requirements for a complete proposal to HECO and MECO (other than to provide an updated NUG proposal and to address certain "concerns" of HECO and MECO) and the criteria for evaluation to be used to determine the winning or successful proposal; and finally, (4) to conclude that MECO, by its own unilateral action and without any explanation of the basis for its action, "has decided to enter into negotiations for a power purchase agreement (PPA) with Shell Wind" and advise UPC Hawaii of that decision on December 21, 2007. By this decision, HECO and MECO have decided, as best as UPC Hawaii can surmise, to refuse to take any further steps to identify, let alone resolve, HECO's and MECO's "concerns" about the integration of the Project into MECO's system and to address how UPC Hawaii's Proposal, including the reduction in the Project's capacity, the voluntary self-curtailment and the Battery Energy Storage System components, would resolve those "concerns."

Furthermore, HECO and MECO that have determined on their own that they can only work with one wind energy proposal without any basis to justify that determination. As a result, their joint decision was taken after a process that required UPC Hawaii to guess what HECO's integration and other "concerns" were and to propose a solution to address those unspecified "concerns." In effect, HECO and MECO forced UPC Hawaii to negotiate with and against itself during a process in which they refused by their actions to enter into serious focused negotiations for a power purchase agreement with UPC Hawaii. UPC Hawaii is not concerned with or opposed to Shell Wind's project -- UPC Hawaii believes that both projects can be developed and successfully integrated on Maui -- but is gravely concerned that HECO and MECO have decided arbitrarily and capriciously not to work with UPC Hawaii, which is a proven, experienced and successful developer and operator of the largest wind energy generation facility in Hawaii.

UPC Hawaii has refrained from seeking relief from the Commission until now, because it has relied on HECO's and MECO's repeated assurances that they were in good faith negotiating a power purchase agreement based upon UPC Hawaii's proposal. However, HECO's and MECO's continuing delays in acting on UPC Hawaii's proposal, HECO's refusal to undertaken the IRS, and their imposition upon UPC Hawaii of their "mini-competitive bidding" process make unequivocally clear that HECO and MECO never intended to enter into a power purchase agreement with UPC Hawaii. HECO's and MECO's joint actions have caused UPC Hawaii to incur substantial additional expenses for engineering studies, development costs and advance payments for turbine supply reservations. These specific impacts do not include the larger impacts of delaying the Project's efficient and immediate harnessing Maui's preeminent wind energy renewable resources to provide clean and relatively low-cost and definitely needed electric energy to the people of Maui.

Although considerably more than 75 days have passed since UPC Hawaii initially tendered its proposal for the Project on June 12, 2006, as updated and enhanced on August 31, 2007 and as further refined on October 24, 2007 (at HECO's and MECO's request), HECO and/or MECO have not requested a hearing on this matter as required by HAR Section 6-14-15(c). UPC Hawaii thus has no other recourse but to submit this Verified Complaint and Petition for a hearing. In addition, UPC Hawaii believes, as a matter of federal and State law, that it is entitled to a definitive power purchase agreement at rates equal to MECO's actual avoided energy costs at the time that UPC Hawaii tendered its offer and thereby committed to supply energy to MECO. Indeed, the Project would enable MECO to meet its ratepayers' needs for energy, would provide substantial cost savings and other benefits, and would help MECO and HECO meet their renewable performance standards requirements for 2010 as well as promote both their stated goals and the State's goal for the increased use of Hawaii's renewable energy resources to generate electric energy to meet the needs of MECO's customers.

On this basis, UPC Hawaii and Kaheawa Wind respectfully request that the Commission exercise its authority under HAR Sections 6-74-21 and 6-74-15 to order HECO and MECO promptly to resume and conclude the power purchase agreement its negotiations with UPC Hawaii and Kaheawa Wind in connection with the development of UPC Hawaii's Project on the basis of UPC Hawaii's proposal as of August 31, 2007, as refined on October 24, 2007. Although UPC Hawaii is prepared to prove that it is entitled to the relief that it requests at a hearing on this matter, UPC Hawaii believes that the facts establishing HECO's and MECO's refusal to conclude and execute a definitive power purchase agreement are not subject to dispute. UPC Hawaii is prepared to provide the Commission with copies of correspondence with MECO and HECO and other documents supporting the claims made herein following the issuance of a protective order which safeguards the proprietary and confidential nature of such documents.

In addition to the foregoing, UPC Hawaii believes that HECO's and MECO's actions in unilaterally deciding to conduct its own form of "mini-competitive bidding" between UPC Hawaii's Project and Shell Wind's project, based on their own framework, requirements and evaluative criteria that they have not disclosed to UPC Hawaii, directly contravenes the requirements of PURPA, the Commission's Standards, and HRS §269-27.2 [2007]. Under these interrelated legal regimes, HECO and MECO do not, individually or collectively, have the legal right to determine, in their sole discretion, with whom they will or will not deal in terms of power purchase agreement negotiations with a supplier of electric energy generated from a renewable energy resource, in this case wind energy.

It should be noted that the Commission's Framework specifically provides that it "does not apply to:...(ii) offers to sell energy on an as-available basis by non-fossil fuel producers that were submitted to an electric utility before this framework was adopted." Framework, II.A.3.e. As such, UPC Hawaii's Project falls under PURPA, the Commission's Standards and HRS §269-27.2 [2007]. Those legal regimes preclude the use by HECO and MECO of their

mini-competitive bidding process that they unilaterally sought to impose on UPC Hawaii.

II. FACTS

In support of this Complaint and Petition, UPC Hawaii alleges and states as follows:

A. General Background

1. The Complainants are:

UPC Hawaii Holdings, LLC
8 Kiopa'a Street, Suite 104
Pukalani, Hawaii 96768

Kaheawa Wind Partners II, LLC
8 Kiopa'a Street, Suite 104
Pukalani, Hawaii 96768

2. All correspondence, notices, and pleadings in this docket should be sent to:

Gerald A. Sumida
Tim Lui-Kwan
Steven M. Egesdal
Carlsmith Ball LLP
1001 Bishop Street
Suite 2200, ASB Tower
Honolulu, HI 96613

Michael Gresham
UPC Hawaii Holdings, LLC
Kaheawa Wind Power II, LLC
8 Kiopa'a Street, Suite 104
Pukalani, Hawaii 96768

3. The name and address of the respondent is:

Hawaiian Electric Company, Inc.
P.0. Box 2750
Honolulu, HI 96840

Maui Electric Company, Limited
P.O. Box 210
W Kamehameha Ave
Kahului, HI 96732-2253

4. UPC Hawaii, through one or more of its affiliates, has been engaged in developing wind energy power projects, including the 30 MW Kaheawa wind energy project on Maui that sells electric energy to MECO, and other wind energy projects totaling over 320 MW in operation and under construction, and over 5,500 MW under active development in North America.

5. Kaheawa Wind is a wholly-owned subsidiary of UPC Hawaii and is undertaking the development of a 21 MW wind energy project at Kaheawa Pastures on Maui.

B. <u>UPC Hawaii's Kaheawa Wind Energy Project</u>.

1. In June 2006, an affiliate of UPC Hawaii completed its 30 MW Kaheawa wind energy project at Kaheawa Pastures on Maui (the "KWP project"), and since then has sold all of the electric energy generated from the KWP project to MECO under a power purchase agreement, dated December 3, 2004, and approved by the Commission in Decision and Order No. 21701, filed on March 18, 2005, in Docket No. 04-0365.

2. Since beginning commercial operations in June 2006, the KWP project has sold approximately 190 million kilowatthours ("kWh") of electric energy to MECO, which has displaced approximately 350,000 barrels of fossil fuel, and supplies approximately nine percent (9%) of the MECO's total annual electric power demand on Maui.

C. <u>UPC Hawaii's Efforts to Negotiate with MECO and HECO</u>

1. On or about June 12, 2006, UPC Hawaii submitted its Non-Utility Generator form ("NUG") to HECO that proposed the development of the Project, to be a 27 MW wind energy project consisting of 18 wind turbine generators of the same type installed at the KWP project and a substation and to be located at Kaheawa Pastures, Maui, substantially

adjacent to the existing KWP project described in paragraphs 1 and 2 of Section II.B above. UPC Hawaii's proposal projected an in-service date of September 2008 for the Project.

2. The Project is a qualifying facility ("QF") under PURPA, the FERC Regulations and the Commission's Standards and is also a non-fossil fuel producer under HRS 269-27.2.

3. Following the submission on or about June 12, 2006 of its Project proposal, HECO (which was acting for and on behalf of MECO for purposes of negotiating a power purchase agreement with UPC Hawaii for the Project) responded with several letters asking questions about UPC's proposal, to which UPC Hawaii replied. On or about August 31, 2006, UPC Hawaii met with HECO for a high-level feasibility review in which HECO raised questions regarding, among other matters, the integration of as-available wind energy generated power into MECO's grid system. During this time, UPC Hawaii asked that HECO undertake an interconnection requirements study ("IRS") to identify issues involving the integration of wind energy generated power into MECO's system, provide the basis to resolve such issues, and complete the design of the interconnection system. HECO thereafter indicated that it would not accept UPC Hawaii's proposal allegedly on the basis of HECO's and MECO's concerns about wind integration, but did not respond to UPC Hawaii's request that HECO undertake the IRS. During this period, UPC Hawaii sought to determine from HECO what its specific requirements were and continued to provide HECO and MECO with information in response to HECO's questions regarding the Project, including wind integration issues. In September 2006, UPC Hawaii informed HECO once again that the integration issues that HECO had raised could be best addressed by an IRS and asked that HECO undertake such a study, at UPC Hawaii's expense.

4. HECO did not respond to UPC Hawaii's requests that HECO undertake the IRS and UPC Hawaii. In order to continue moving forward on the development of the Project, UPC Hawaii, on or about March 8, 2007, retained ABB, Inc.'s Power Systems Division, Grid Systems - Consulting ("ABB"), to undertake an integration study of the MECO grid system based on information that UPC Hawaii would request from MECO. It took several months for HECO and MECO to provide the full set of data requrested by ABB, but this data when finally provided did represent actual operating conditions of the Maui grid with UPC Hawaii's existing 30 MW KWP project. To UPC Hawaii's knowledge and belief, this analysis by ABB is the only objective study that has been conducted to date on wind integration in Maui's grid. The ABB study concluded that UPC Hawaii and MECO's operations group have successfully worked together to integrate the KWP project into MECO's grid and that further operational changes could be made to accommodate additional as-available energy deliveries into MECO's grid. The ABB study also concluded that several firming options are available, including a Battery Energy Storage System that can mitigate the effects of a variable wind resource and a declining wind resource, both of which were stated concerns of MECO. By analyzing MECO's actual grid performance the existing variable wind resource, ABB was able to size the Battery Energy Storage System needed to successfully integrate UPC Hawaii's Project into MECO's grid. UPC Hawaii ultimately provided HECO and MECO with the ABB study as part of UPC Hawaii's updated and enhanced proposal submitted to HECO on or about August 31, 2007 as described in paragraph 7 below. HECO did not specifically respond to the ABB study.

5. On or about June 6, 2007, HECO advised UPC Hawaii that HECO and MECO would be addressing UPC Hawaii's proposal for the Project and that HECO and MECO would be willing to continue negotiations for a power purchase agreement with only one of the

two developers that had been "grandfathered" by the Commission's Framework prior to MECO's completing its own study on grid integration issues if MECO's concerns on these issues could be adequately addressed. MECO stated its intention to proceed in a structured manner to consider the two "grandfathered" proposals by each of UPC Hawaii and Shell Wind.

6. On or about July 20, 2007, HECO sent a joint letter to UPC Hawaii and Shell Wind and stated MECO's intent to proceed with a structured negotiation format to select one company with which to negotiate a power purchase agreement. HECO also stated that study efforts were then underway to address the challenges of integrating additional wind energy into MECO's system, but that the study results would not be available until sometime in 2008, and until that study was completed and the results evaluated, HECO and MECO were uncertain that MECO could take additional power from a resource that did not have firm power characteristics. HECO's letter also cited an excerpt from its IRP-3, covering the period 2007-2026 and dated April 30, 2007, which referred to this integration study and stated that MECO would determine how much, if any, additional intermittent generation MECO's system could accept without unduly impacting its grid stability. HECO's letter also asked UPC Hawaii and Shell Wind to submit no later than August 31, 2007 an updated NUG and to respond to certain additional "concerns" listed in the letter.

7. On or about August 31, 2007, UPC Hawaii submitted its updated proposal as requested by HECO, which included its updated NUG and specific responses to MECO's listed concerns. This proposed was revised and enhanced in the following critical ways to try to address HECO's and MECO's wind integration concerns to the extent that UPC Hawaii could assess them: (i) it reduced the capacity of the Project from an initially proposed 27 MW to 21 MW, (ii) it proposed the voluntary total self-curtailment of the Project's electric energy output to

zero generation during MECO's off-peak hours, the period most often associated with light loading conditions, and (iii)) it incorporated a customized and innovative Battery Energy Storage System to minimize wind integration issues. UPC Hawaii also included a copy of ABB's study on the wind integration issues, which set forth recommendations on how UPC Hawaii's Project could be integrated into MECO's system.

8. Thereafter, on or about October 9, 2007 HECO sent a letter to UPC Hawaii with questions about its proposal and requested a response by October 15, 2007. On or about October 11, 2007 HECO sent another letter to UPC Hawaii with additional questions. On or about October 24, 2007, UPC responded to HECO's two letters with extensive and detailed responses to HECO's questions. Thereafter, UPC Hawaii did not receive any response or further communication from HECO or MECO until the HECO's letter dated December 21, 2007 advising that MECO would negotiate for a power purchase agreement only with Shell Wind as described in paragraph 10 below.

9. On or about November 20, 2007, as a result of hearing no response from HECO, UPC Hawaii requested a meeting with HECO to discuss the status of UPC Hawaii's proposal and to present additional information on its proposed Battery Energy Storage System. UPC Hawaii finally met with HECO and MECO on December 13, 2007 and provided another detailed review of its proposal for the Project, including an analysis and modeled examples of a successful integration of UPC Hawaii's Project and MECO's grid through the voluntary self-curtailment during MECO's off-peak periods and the incorporation of the Battery Energy Storage System. This analysis again used actual historical performance data for MECO's grid system. UPC Hawaii received no specific response from HECO or MECO as a result of that meeting.

10. On or about December 21, 2007, UPC Hawaii received a short one-page letter from HECO stating that HECO had decided to enter into negotiations for a power purchase agreement only with Shell Wind. HECO's purported reason for selecting Shell Wind was that "For similar sized wind projects employing battery storage technology, it was decided that reduced wind resource coincidence offered by the Shell wind [sic] site was an important advantage."

11. By letter dated January 15, 2008, UPC Hawaii responded to HECO's letter dated December 21, 2007, questioning the legal validity of HECO's and MECO's use of their self-designed "mini-competitive bidding" procedure that they imposed upon UPC Hawaii and Shell Wind, the manner in which HECO and MECO had dealt with UPC Hawaii during the course of the negotiations for a power purchase agreement for UPC Hawaii's Project, and the basis for any action by HECO and MECO that concludes that there are essentially no substantial wind integration issues even though MECO's own study of these issues has, to UPC Hawaii's knowledge and belief, not yet been completed as of the date of this Complaint and Petition.

12. UPC Hawaii has continued throughout all relevant times during this period to develop the Project, including acquiring site control, arranging for the acquisition of and payment for the wind turbine generators for the Project (which are long lead-time order items), and commencing permitting activities, including preparing a Habitat Conservation Plan and preliminary Environmental Impact Statement .

13. Despite UPC Hawaii's concerted efforts promptly to respond to each and every one of HECO's and MECO's questions and requests for additional information and clarifications concerning the Project and to seek to address all of HECO's and MECO's stated concerns about wind integration issues, HECO has steadfastly refused to undertake, or even to

consider undertaking, the IRS that UPC had repeatedly asked for. That IRS, which HECO and MECO themselves require to be performed for an energy project, is essential to identify the specific wind integration issues that could be involved in the Project and how these should best be addressed and resolved. The IRS is also necessary to complete final design of both the Project itself as well as the interconnection system on both UPC Hawaii's as well as MECO's parts, and to identify and address other related matters in order to conclude and execute a definitive power purchase agreement. Indeed, HECO and MECO have specifically and steadfastly emphasized their concerns about wind integration issues, and in the face of their collective refusal to undertake the IRS to identify what they claim are specific integration issues, UPC Hawaii at its own expense retained ABB undertake such a study, using grid information that MECO itself provided to UPC Hawaii and ABB. Despite this, HECO and MECO never responded to ABB's integration study or its recommendations for successful integration into MECO's grid that UPC Hawaii is prepared to follow. As of the date of this Complaint and Petition, UPC Hawaii, on the one side, and HECO and MECO, on the other side, have been unable to conclude a power purchase agreement for the Project because HECO and MECO have simply refused to enter into such negotiations with UPC Hawaii and now apparently have determined that they will not continue any such negotiations with UPC Hawaii because MECO has chosen to negotiate only with Shell Wind.

III. GROUNDS FOR COMPLAINT

A. HECO and MECO Have Violated HAR Section 6-74-15(c)

1. UPC Hawaii restates its allegations contained in paragraphs 1 through 13 of Section II.C. as if set forth herein.

2. HAR Section 6-74-15(c) provides that if an electric utility and a QF have failed to reach an agreement on the rate of terms of purchase within 75 days after the QF's offer, the utility shall submit a petition to the Commission requesting a hearing on the matter.

3. On or about June 12, 2006, UPC Hawaii tendered its proposal for a power purchase agreement for the sale of electric energy generated by the Project to MECO, which was incorporated into HECO's/MECO's NUG format. Thereafter, following a series of questions and information requests from HECO to which UPC Hawaii fully and promptly responded, UPC Hawaii, at HECO's specific request and instruction, submitted to them on or about August 31, 2007 its updated and enhanced version of its offer for the Project, which included (i) reducing the capacity of the Project from 27 MW to 21 MW, a proposal for the voluntary full self-curtailment of Project output of electric energy during MECO's off-peak periods and the Battery Energy Storage System to resolve wind integration issues. HECO responded to this proposal with a series of additional questions, which UPC Hawaii promptly answered on or about October 24, 2007. Hearing no response from HECO, UPC Hawaii again reiterated its offer to HECO and MECO on December 13, 2007.

4. Significantly more than 75 days has elapsed since UPC Hawaii tendered an offer for a power purchase agreement and, at HECO's specific request, its updated and enhanced offer. Nonetheless, HECO and HECO have failed to submit a petition requesting a hearing, as required by HAR Section 6-74-15(c).

5. UPC Hawaii believes that it is entitled to a Commission Order directing HECO and MECO to make the filing required by Section 6-74-15. However, in the interest of time and to avoid further burdening the Commission, UPC Hawaii requests that the Commission

conduct a hearing on this Complaint and Petition in lieu of requiring HECO and/or MECO to file a petition pursuant to HAR Section 6-74-15.

B. HECO and MECO Have Violated PURPA and HAR Section 6-74-22

1. UPC Hawaii restates its allegations contained in paragraphs 1 through 13 of Section II.C. as if set forth herein.

2. The Public Utility Regulatory Policies Act of 1978 ("PURPA") imposes an obligation on electric utilities to purchase electric energy from QFs. PURPA has been implemented by rules of the Federal Energy Regulatory Commission ("FERC") and this Commission.

3. Under the FERC rules, a QF has the right to provide energy to an electric utility on an as-available basis and at purchase rates based on the utility's avoided costs calculated at the time of delivery. 18 C.F.R. §292.304(d)(1). As the preamble to FERC's rules makes clear, this rule was intended to prevent a utility from depriving a QF of its right to commit to sell power in the future at a predetermined price "merely by refusing to enter into a contract." 45 Fed. Reg. 12224 (1980).

4. The right to sell power to electric utilities is also embodied in this Commission's rules governing obligations of electric utilities with respect to QFs. HAR Section 6-74-22(c) provides that each QF shall have the option (i) to provide energy on an as-available basis and at purchase rates based on the utility's avoided energy costs calculated at the time of delivery, or (ii) to provide firm energy or capacity. In the instant situation, UPC Hawaii has offered an as-available energy power purchase agreement to MECO.

5. Under these legal standards, MECO is obligated to purchase power from UPC Hawaii's Project.

6. UPC Hawaii's Project is a QF small power production facility under PURPA, the FERC rules and the Commission's Standards.

7. In both its original offer made to HECO and MECO on or about June 12, 2006, and in its updated and enhanced offer made at HECO's request to HECO on or about August 31, 2007 (which included the reduction of the Project's capacity from 27 MW to 21 MW, the voluntary total curtailment of the Project's electric output during MECO's off-peak periods, and the Battery Energy Storage System), and further refined by its letter dated October 24, 2007 in response to still further questions by HECO, UPC Hawaii tendered a final and complete offer for power purchase agreement, which sought to address all of those wind integration concerns that HECO and MECO had raised, even though HECO had never responded to UPC Hawaii's several requests for an IRS to identify the specific wind integration concerns of HECO and MECO and lay the groundwork to develop ways to resolve any such issues. UPC Hawaii's offer represented its good faith efforts to negotiate and execute a power purchase agreement with MECO and to assist MECO and the County of Maui in the further development of an exceptional wind energy resource. After UPC Hawaii had promptly complied with every one of HECO's and MECO's information requests, HECO then, in its December 21, 2007 letter, stated that it would engage in power purchase agreement negotiations only with Shell Wind.

8. HECO's actions and non-actions have fundamentally frustrated and delayed UPC Hawaii's development of the Project as a QF, which would provide substantial benefits to MECO's ratepayers and provide an expanded source of electric energy to Maui from Maui's own indigenous renewable wind energy resources, thereby significantly furthering the State's renewable energy goals. HECO's and MECO's conduct has resulted in critical permitting delays and substantial additional costs to UPC Hawaii in its development of the Project, which in

turn have caused a delay in the Project's original date of commencement of commercial operations projected for September 2008.

9. UPC Hawaii therefore believes that it is entitled to an Order by the Commission (1) directing HECO and MECO to conclude negotiating and to execute a final power purchase agreement with UPC Hawaii based on UPC Hawaii's August 31, 2007 offer, as refined on October 24, 2007, (2) directing HECO to undertake immediately the IRS, which UPC Hawaii has been ready and willing to pay the cost therefor, and (3) authorizing UPC Hawaii to submit a power purchase agreement based on the contract terms embodied in UPC Hawaii's October 24, 2007 offer directly to the Commission for approval if MECO (presumably acting by and through HECO) and UPC Hawaii, on the other side, fail to agree on all terms and conditions within 30 days of such Order.

C. MECO and HECO Have Acted to the Detriment of MECO's Ratepayers and Against Public Policy by Its Practices with Respect to UPC Hawaii's Proposals

1. UPC Hawaii restates the allegations contained in paragraphs 1 through 13 of Section II.C. as if set forth herein.

2. As discussed above, to accommodate HECO's and MECO's stated wind integration concerns, UPC Hawaii has specifically designed its Project to include a customized and innovative Battery Energy Storage System and other wind management measures, including the voluntary total curtailment of the Project's electric energy output during MECO's off-peak periods. HECO and MECO have essentially responded that MECO is undertaking its own wind integration study, the results of which are supposed to be used by MECO to determine how much wind energy MECO can accept on its system and possibly what mitigation measures will be recommended in that regard. MECO has also stated that the results of this study would not be

available until sometime in 2008, and has not disclosed the scope of that study or its basic assumptions to UPC Hawaii. To assist in identifying MECO's specific wind integration issues, UPC Hawaii requested on several occasions that HECO and MECO undertake the IRS for UPC Hawaii's Project, which would reveal any such specific matters, which UPC Hawaii and HECO and MECO could then address and determine how best to resolve. Instead, HECO and MECO never responded to these requests, and UPC Hawaii, in frustration at this non-response and at the ensuing delays in being able to progress in developing the Project, retained ABB to undertake such an integration study. Thereafter, UPC Hawaii provided to HECO the ABB study and its recommendations to deal with integration issues; again, however, neither HECO nor MECO ever substantively responded to that study or to UPC Hawaii's specific efforts to identify and to address HECO's and MECO's wind integration issues.

3. UPC Hawaii's Project would provide significant benefits to MECO's ratepayers, including reducing Maui's and MECO's dependency on very costly imported fossil fuels and the attendant costs and, equally important, developing one of Maui's prominent and plentiful renewable energy resources. In addition, by developing its Project, UPC Hawaii would directly enable MECO and HECO substantially to reduce its future generation construction budget as well as contribute to their fulfillment of their RPS requirements.

4. UPC Hawaii believes that HECO's and MECO's practices concerning UPC Hawaii's proposal and Project are unreasonable and constitute an abuse of its monopsony power as to the sole purchaser of wholesale electric energy on the Island of Maui. HECO and MECO simply failed to consider seriously UPC Hawaii's original offer of June 12, 2006, repeatedly asked questions about the proposal and the Project with no seeming results, direction or responses, repeatedly asked for more information and clarification but without giving any

responses to what UPC Hawaii provided, specifically asked for an updated and enhanced offer which UPC Hawaii provided on or about August 31, 2007 (and which included the reduction in the Project's capacity from 27 MW to 21 MW, the voluntary total curtailment of the Project's output during MECO's off-peak periods, and the customized and innovative Battery Energy Storage System), responded on or about October 24, 2007 to still further questions from HECO on this proposal, and then, after prolonged silence, told UPC Hawaii that MECO and HECO would undertake power purchase agreement negotiations only with Shell Wind. By these actions and non-actions, HECO and MECO have caused UPC Hawaii to expend very substantial time, effort and money to respond to HECO and MECO, to try to assist those parties by retaining ABB to undertake the IRS that HECO and MECO simply refused to do (even though UPC Hawaii would pay the costs of the IRS, as required by HECO), to explore continuously ways to deal with HECO's and MECO's generally stated wind integration issues and ultimately develop a solution using the Battery Energy Storage System, and to develop the updated and enhanced proposal of August 31, 2007, and subsequently refine that proposal on October 24, 2007. UPC Hawaii complied with every request by HECO and MECO, including developing the detailed Battery Energy Storage System component of its proposal. Moreover, by deliberately encouraging UPC Hawaii to provide the full details of its proposal and respond to successive rounds of questions, without giving any substantive responses, HECO and MECO then changed the existing basis of the negotiations by stating that they would conduct their own mini-competitive bidding process in which HECO and MECO would decide, using their own requirements, criteria and evaluative system that they never disclosed to UPC Hawaii, that they would negotiate only with Shell Wind for a power purchase agreement. If HECO and MECO are allowed to succeed in their use of this completely opaque and highly suspect, unfair and invalid approach, which contravenes

PURPA, the Commission's Standards and HRS §269-27.2, then HECO and MECO will have essentially and effectively subverted the legal regime governing the development of Hawaii's renewable energy resources and effectively eliminated a proven non-utility generation resource that would use Maui's and Hawaii's abundant indigenous renewable energy resource and will be allowed to create a utility-devised and manipulated procedure that gives HECO and MECO full control to decide with whom, if anyone, they will choose to allow to negotiate with them for future energy generation resources, whether or not using Hawaii's renewable energy resources. This would be especially egregious since HECO's and MECO's decision, as stated in its December 21, 2007 letter to UPC Hawaii, apparently is based solely on MECO's own wind resource assessment, an area in which MECO has no demonstrable experience.

5. If allowed by this Commission, HECO's and MECO's practices not only would frustrate and undermine UPC Hawaii's good faith efforts to provide a reliable source of least-cost power, using Hawaii's renewable energy resources, but would also have a chilling effect on the development of non-utility generation power resources in Hawaii, especially those seeking to use Hawaii's renewable energy resources. The Commission's Framework governing competitive bidding by its terms does not apply to UPC Hawaii's Project, and presumably all renewable energy projects proposed after December 8, 2006 (the date that the Framework become effective) will be subject to the Framework, which nonetheless establishes a lengthy, complex and expensive competitive bidding process for new generation resources. If HECO and MECO are allowed, in violation of PURPA, the Commission's Standards and HRS §269-27.2, to use their own mini-competitive bidding procedure, then it is highly questionable whether the few remaining developers of non-utility generation resources to which the Framework does not apply would be willing to spend the time, effort and money to propose projects that could be subjected

to HECO's own mini-competitive bidding process and conduct months of protracted power purchase agreement negotiations, only to have the utility simply refuse to sign a power purchase agreement and decide to with whom it will choose to negotiate to the exclusion of other developers of such projects.

6. Pursuant to its general authority under HRS Sections 269-7, 269-8 and 269-15, the Commission has the power to investigate and take action concerning HECO's and MECO's business practices, including with respect to the purchase if power from non-utility generation resources, including renewable energy resources from QFs.

7. Pursuant to HRS Section 269-6(b) the Commission may consider the need for increased renewable energy use in exercise its authority and duties under HRS Chapter 269 and under HRS Chapter 269 to exercise its statutory powers to review HECO's and MECO's business practices, including those that directly or inadvertently hinder and obstruct the development of the State's renewable energy resources.

8. Therefore, UPC Hawaii believes that the Commission, in the best interests of MECO's ratepayers, the Island of Maui's general public and the State of Hawaii in general because of the State's policy to promote the development of its renewable energy resources, should investigate HECO's and MECO's practices concerning UPC Hawaii's proposal and upon consideration (i) find and declare that the mini-competitive bidding process devised by HECO and MECO and imposed upon UPC Hawaii violates of PURPA, the Commission's Standards and HRS 269-27.2 and is invalid and null and void, (ii) direct HECO and MECO to cease and desist any further action under their mini-competitive bidding process, (iii) direct HECO and MECO to cancel and rescind immediately their decision not to negotiate a power purchase agreement with UPC Hawaii for the Project, (iv) order HECO and MECO to resume immediately power

purchase agreement negotiations with UPC Hawaii based on UPC Hawaii's August 31, 2007 updated and enhanced offer, as refined on October 24, 2007, (vi) order HECO and MECO to undertake the IRS for UPC Hawaii's Project, and work with UPC Hawaii to evaluate the results of the IRS to determine how best to address any remaining wind integration issues that the IRS identifies, or, in the alternative, ordering MECO to adopt the ABB study as the IRS and work with UPC Hawaii to determine how best to address any remaining wind integration issues that the ABB study has identified, and (vi) prohibit HECO and MECO from undertaking any further informal competitive bidding process that they attempted to impose upon UPC Hawaii in situations where the Framework does not apply, without the express supervision of and approval by the Commission.

IV. RELIEF REQUESTED

UPC Hawaii is prepared to prove that it is entitled to the relief it requests at an evidentiary hearing on this matter. However, UPC Hawaii also believes that the facts establishing HECO's and MECO's decision to negotiate a power purchase agreement only with Shell Wind and to refuse to continue power purchase agreement negotiations with UPC Hawaii are not subject to dispute. Hence, UPC Hawaii would not be opposed to the Commission resolving this matter expeditiously without the need for an evidentiary hearing.

WHEREFORE, Complainant requests that the Commission exercise its authority under the Commission's Standards and orders implementing PURPA and its general authority pursuant to HRS Chapter 269 to:

1. Assert jurisdiction over this Complaint and Petition and conduct, on an expedited basis, such investigations, hearings, and other proceedings which it deems necessary, including setting the matter for a hearing pursuant to HAR Section 6-74-15;

2. Upon consideration, enter an Order (i) finding and declaring that the mini-competitive bidding process devised by HECO and MECO and imposed upon UPC Hawaii violates of PURPA, the Commission's Standards and HRS 269-27.2 and is invalid and null and void, (ii) directing HECO and MECO to cease and desist any further action under their mini-competitive bidding process, (iii) directing HECO and MECO to cancel and rescind immediately their decision, stated in HECO's letter dated December 21, 2007 to UPC Hawaii, with apparent intention not to negotiate a power purchase agreement with UPC Hawaii for the Project, (iv) ordering HECO and MECO to resume immediately power purchase agreement negotiations with UPC Hawaii based on UPC Hawaii's August 31, 2007 updated and enhanced offer, as refined on October 24, 2007, (vi) ordering HECO and MECO to undertake promptly the IRS for UPC Hawaii's project at UPC Hawaii's reasonable cost, and work with UPC Hawaii to evaluate the results of the IRS to determine how best to address any remaining wind integration issues that the IRS identifies, or, in the alternative, ordering MECO to adopt the ABB study as the IRS and work with UPC Hawaii to determine how best to address any remaining wind integration issues that the ABB study has identified, and (vi) prohibiting HECO and MECO from undertaking any further informal competitive bidding process that they attempted to impose upon UPC Hawaii in situations where the Framework does not apply, without the express supervision of and approval by the Commission; and

3. Grant such other and further relief as the Commission deems appropriate.

DATED: Honolulu, Hawaii, February 6, 2008.

GERALD A. SUMIDA
TIM LUI-KWAN
STEVEN M. EGESDAL

Attorneys for
UPC Hawaii Holdings, LLC
Kaheawa Wind Power II, LLC

STATE OF HAWAII)
) SS:
COUNTY OF MAUI)

PAUL GAYNOR, being first duly sworn, deposes and says: That he is the President of UPC Hawaii Holdings, LLC, the within-named Complainant; that he has read the foregoing Verified Complaint and Petition, knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

Paul Gaynor

Subscribed and sworn to before me,
this 6th day of February, 2008.

Notary Public MARJORIE VON BERG

My commission expires: 3/22/08

L.S.

STATE OF HAWAII)
) SS:
COUNTY OF MAUI)

PAUL GAYNOR, being first duly sworn, deposes and says: That he is the President of Kaheawa Wind Power II, LLC, the within-named Complainant; that he has read the foregoing Verified Complaint and Petition, knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

Paul Gaynor

Subscribed and sworn to before me,
this 6th day of February, 2008.

Marjorie Von Berg
My commission expires: 3/20/08
MARJORIE VON BERG

L.S.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served copies of the foregoing upon the following parties, by causing copies hereof to be hand delivered or mailed, postage prepaid, and properly addressed to each such party as follows:

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DATED: Honolulu, Hawaii, February 6, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 24034 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Karen Higashi

DATED: FEB 1 1 2008